

No. 15348

In the
United States Court of Appeals
For the Ninth Circuit

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

Answer to Petition for Rehearing

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*To the Honorable Chief Judge and the Associate
Judges of the United States Court of Appeals
for the Ninth Circuit:*

The petitioner bases his claim to a rehearing on two grounds, one of which is the following:

(1) They state: The opinion and decision neither discusses nor considers certain evidence in the record, which "establishes beyond a question, and with clear and convincing force appellee misrepresented his condition during the trial." This statement is without foundation in fact or truth. The evidence to which

they refer is found on page 3 of the petition for a rehearing and which is as follows:

“Q. Sometimes it is not as great as others, is that right?

A. I don't know, sir, because I don't have no control of it; I don't know sometimes whether I am doing it, I don't know.

Q. Don't you know when you are doing it and when you are not doing it?

A. I don't pay too much attention to it; no.”

The petitioner to give force to his claim that the above statement is false underscores a portion of it. It is significant, however, that he fails to underscore the use of the word “sometimes”, used as follows:

“I don't know sometimes whether I am doing it . . . ”

Webster's new unabridged dictionary, second edition, defines sometimes as follows:

Sometimes, at times; not always; now and then; occasionally.

This fits in exactly with Barrett's affidavit where he explains the use of the word “seldom”, and which is quoted by petitioner in an attempt to show a false statement. To say that the court did not consider this evidence is a false statement. The court in its written opinion on page 2 states:

“By deposition taken before trial, plaintiff testified he had no control over the twitching, that he

was seldom without it, though unaware whether or not he was twitching.”

However, we must observe that the court failed to quote the use of the word sometimes. Of course the court cannot be expected to set forth all of the testimony, but only a summary of that portion deemed pertinent.

At most the petitioner has shown uncertainties, inconsistencies, or conflicts, all of which have been resolved against the petitioner by the jury and the court below.

Under point two the petitioner asks the court to water down the well-established rules for establishing fraud and misrepresentation. In its decision the court states:

“and this circuit has found no difficulty setting up the rules, denominating them well understood.”

The court in its opinion has given consideration to all of the points again raised by the petitioner.

“Where a citation was mainly relied on at the oral argument and appeared prominently in the brief, rehearing should not be applied for on the ground that the court inadvertently overlooked the citation, but it should be assumed that the court had given the point due consideration. *F. Rosenstern & Co. v. U. S.*, 171 Fed. 71.”

We feel the court has given due consideration to a renewal of the points made in the petition for rehearing.

Respectfully submitted,

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